No. 83-185

In the Supreme Court of the United States

OCTOBER TERM, 1983

SYLVIA COOPER, ET AL., PETITIONERS

v.

FEDERAL RESERVE BANK OF RICHMOND

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT

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Petitioners Cooper, et al., contend that the court of appeals failed to give proper weight to the findings of the district court.[1]

1. On March 22, 1977, the Equal Employment Opportunity Commission brought a civil action in the

[1] Petitioners Baxter, et al., also contend that they should not have been barred from asserting their individual claims of discriminatory treatment by the finding of no discrimination against the group to which they belong. Since the EEOC was not a party to the *Baxter* proceedings below, we express no views on this issue here.

United States District Court for the Western District of North Carolina alleging that the Federal Reserve Bank of Richmond had violated Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a), by failing to promote black employees at its Charlotte, North Carolina, branch because of their race. The complaint also alleged that the Bank had specifically discriminated against Sylvia Cooper by failing to promote her and subsequently discharging her because of her race. On September 21, 1977, the district court permitted Cooper and three other individuals to intervene in the action; a class consisting of " '[a]ll black persons who have been employed by the defendant at its Charlotte Branch Office at any time since January 3, 1974 * * *, who have been discriminated against in promotion, wages, job assignments and terms and conditions of employment because of their race' " was conditionally certified on April 26, 1978 (Pet. App. 199a-200a; footnote omitted).

Following an eight-day bench trial and consideration of additional submissions by both parties (Pet. App. 199a), the district court issued a Memorandum of Decision holding "that defendant engaged in a pattern and practice of discrimination from 1974 though 1978 by failing to afford black employees opportunities for advancement and assignment equal to opportunities afforded white employees in pay grades 4 and 5" (*id.* at 193a-194a). The court furtner held that the Bank had intentionally discriminated against Ms. Cooper and one other intervenor but had not discriminated against the other intervenor (*id.* at 192a).[2]

[2] It also concluded (Pet. App. 194a) that "there does not appear to be a pattern and practice of discrimination pervasive enough for the court to order relief" for employees in other

The court directed the plaintiffs to submit proposed findings of fact and conclusions of law consistent with the above findings. After considering the Bank's comments regarding the plaintiffs' proposed findings, the district court on May 29, 1981, issued Findings of Fact and Conclusions of Law that were nearly identical to those submitted by plaintiffs (*id.* at 197a-285a).

2. The court of appeals reversed. Noting that the district court's Memorandum of Decision concluding that the Bank had engaged in a pattern and practice of discrimination was an "ultimate fact * * * not a finding of fact reviewable under the 'clearly erroneous' rule, and sustainable only if adequate supportive subsidiary findings are made" (Pet. App. 15a), the court focused on the detailed findings and conclusions of May 29, 1981.

Although the court of appeals "expressed [its] disapproval" of the practice of requesting the prevailing party to provide findings of fact and conclusions of law which the court then "adopts almost word-for-word in support of its previously announced decision" (Pet. App. 16a-17a), the court of appeals recognized that such a procedure does not render inapplicable

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pay grades. The Baxter class members, in pay grades over 5, thereupon moved to intervene individually. The court denied the motion, noting that "I see no reason why * * * they cannot file a Section 1981 suit next week, nor why they could not file a claim with EEOC next week" (Pet. App. 288a).

The Baxter petitioners thereupon filed a separate action, alleging that the bank had discriminatorily denied each of them promotions because of their race, in violation of 42 U.S.C. 1981 (Pet. App. 176a). The district court denied the Bank's motion to dismiss, and certified the question to the court of appeals (*id.* at 290a-291a), where it was consolidated with the Bank's appeal in *Cooper* (*id.* at 172a).

the requirement of Fed. R. Civ. P. 52(a) that the district court's findings of fact must be upheld unless clearly erroneous (Pet. App. 21a). Nevertheless, it agreed with a number of other courts of appeals that such findings should be subjected to " 'careful scrutiny' by the appellate court * * * [and should be] 'more narrowly' examined than findings and conclusions which, because developed independently by the trial judge, provide assurance that the District Judge making the findings and conclusions 'did indeed consider all the factual questions thoroughly and * * * guarantee[s] that each word in the finding [was] impartially chosen' " (Pet. App. 23a-24a; citations omitted). Applying this " 'careful scrutiny' " to the anecdotal and statistical evidence in the record, the court of appeals concluded that the district court's factual findings were clearly erroneous (*id.* at 29a-172a). It directed dismissal of the class and individual claims (*id.* at 129a, 153a, 172a).[3]

3. Petitioners contend (Pet. 19-38) that the court of appeals failed to apply the "clearly erroneous" standard required by Fed. R. Civ. P. 52(a) in reviewing the district court's factual findings, and that there is an inter-circuit conflict on the standard for review of factual findings that have been proposed by a party and adopted substantially without change by the district court. Like petitioners, we believe that the record fully supports the district court's factual findings. Unlike petitioners, we believe the court articulated the appropriate standard of review in this case—the clearly erroneous standard. However, the court ap-

[3] The court also concluded that the Baxter petitioners' Section 1981 suit should have been dismissed, on the theory that, because they were part of the class certified in the original action, their claims were res judicata (Pet. App. 172a-183a).

plied a more searching review of the court's findings because of their origin. There is some disparity in the circuits on the way such findings are approached. This difference of approach, in our view, does not rise to the level of a conflict warranting review by this Court.

The Equal Employment Opportunity Commission, as a plaintiff below, presented substantial anecdotal and statistical evidence to support the charge that the Bank discriminated against blacks in its promotion policies. The district court concluded that this evidence was persuasive and unrebutted. While we disagree with the court of appeals' reversal of the district court's factual findings supporting this conclusion, we do not believe that reversal resulted from the application of an incorrect standard of review, or was inconsistent with any decisions of this Court or any other court of appeals. See, *e.g.*, *U.S. Postal Service* v. *Aikens*, No. 81-1044 (Apr. 4, 1983).

The court of appeals' disapproval of the practice of requesting the prevailing party to prepare findings of fact, and then adopting them verbatim, is consistent with this Court's comments in *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 656-657 & n.4 (1964), and *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 184-185 (1944). But the court of appeals also followed this Court's conclusion in those cases that such findings "are nonetheless the findings of the District Court" (323 U.S. at 185; see also 376 U.S. at 656), which accordingly must be reviewed under the "clearly erroneous" standard of Fed. R. Civ. P. 52(a) (Pet. App. 21a).

Most circuits that have considered this issue have disapproved of the practice and concluded that findings adopted verbatim by a district court from pro-

posals requested from the prevailing party should be particularly carefully reviewed on appeal.[4] Two circuits have, however, rejected criticisms of the practice. *O'Leary* v. *Liggett Drug Co.*, 150 F.2d 656, 667 (6th Cir. 1946); *Schilling* v. *Schwitzer-Cummins Co.*, 142 F.2d 82, 83 (D.C. Cir. 1944). Accordingly, we agree with petitioners that there is a split in the circuits on this issue. We do not, however, believe that this difference in approach will result in significant differences in the level of appellate review under Fed. R. Civ. P. 52(a); an appellate court cannot, in any event, ignore the circumstances under which the district court's findings have been made. There are, in addition, semantic differences in the way that courts that disapprove of the practice formulate the appropriate level of scrutiny[5] as well as differences in the

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[4] See, *e.g.*, *Scheller-Globe Corp.* v. *Milsco Mfg. Co.*, 636 F.2d 177, 178 (7th Cir. 1980); *Ramey Constr. Co.* v. *Apache Tribe*, 616 F.2d 464, 469 n.7 (10th Cir. 1980); *Amstar Corp.* v. *Domino's Pizza, Inc.*, 615 F.2d 252, 258 (5th Cir. 1980); *Hill & Range Songs* v. *Fred Rose Music, Inc.*, 570 F.2d 554, 558 (6th Cir. 1978); *International Controls Corp.* v. *Vesco*, 490 F.2d 1334, 1341 n.6 (2d Cir. 1974); *In re Las Colinas, Inc.*, 426 F.2d 1005, 1009 (1st Cir. 1970); *Roberts* v. *Ross*, 344 F.2d 747, 751-752 (3d Cir. 1965); *Bradley* v. *Maryland Casualty Co.*, 382 F.2d 415, 423 (8th Cir. 1967).

[5] See, *e.g.*, *Ramey Constr. Co.* v. *Apache Tribe*, 616 F.2d at 467 (will review "with a more critical eye"); *Continuous Curve Contact Lenses, Inc.* v. *Rynco Scientific Corp.*, 680 F.2d 605, 607 (9th Cir. 1982) (will give "special scrutiny"); *In re Las Colinas, Inc.*, 426 F.2d at 1010 (will undertake "most searching examination for error"); *Roberts* v. *Ross*, 344 F.2d at 752 (such findings "likely to be looked at * * * more narrowly and given less weight on review"). We do not believe that these differences reflect a substantial difference in approach, or are likely to lead to different results in similar cases. Nor do we believe that this heightened scrutiny means that

manner in which the courts dispose of a case after rejecting findings adopted verbatim by the trial court. For instance, some courts remand for further findings [6] while others substitute their own assessment of the facts.[7] We believe the better approach is to remand the case for new findings by the district court. We are not aware of any circumstances which would justify the failure of the court below to follow that practice here.

4. Petitioners also assert (Pet. 38-40) that the decision below is inconsistent with *Pullman-Standard* v. *Swint*, 456 U.S. 273 (1982), and merits summary reversal on that ground. This Court emphasized in *Pullman-Standard* that "Rule 52(a) broadly requires that findings of fact not be set aside unless clearly erroneous. * * * It does not divide facts into categories; in particular, it does not divide findings of fact into those that deal with 'ultimate' and those that deal with 'subsidiary' facts" (456 U.S. at 287). Specifically, the Court held that the question whether the differential racial impact of a seniority system

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the appellate courts are failing to comply with the requirements of Fed. R. Civ. P. 52(a) and undertaking de novo review in such cases. In fact, the courts have frequently recognized, as did the court below, that the clearly erroneous standard of Rule 52(a) must be applied. *Scheller-Globe Corp.* v. *Milsco Mfg. Co.*, 636 F.2d at 178; *Amstar Corp.* v. *Domino's Pizza, Inc.*, 615 F.2d at 258; *In re Las Colinas, Inc.*, 426 F.2d at 1010; cf. *Hill & Range Songs* v. *Fred Rose Music, Inc.*, 570 F.2d at 558.

[6] See, *e.g.*, *In re Las Colinas, Inc.*, 426 F.2d at 1010; *Ramey Const. Co.* v. *Apache Tribe*, 616 F.2d at 468; *Schilling* v. *Schwitzer-Cummins Co.*, 142 F.2d at 83.

[7] See, *e.g.*, *Amstar Corp.* v. *Domino's Pizza, Inc.*, 615 F.2d at 259.

reflected an intent to discriminate was a purely factual question (456 U.S. at 287-288). But it carefully distinguished the "much-mooted issue of the applicability of the Rule 52(a) standard to mixed questions of law and fact" (456 U.S. at 289 n.19), and cited as an example of such mixed questions those that "in some cases may allow an appellate court to review the facts to see if they satisfy some legal concept of discriminatory intent" (456 U.S. at 289). Accordingly, the reference of the court below to the district court's conclusion in its Memorandum of Decision that the Bank had discriminated in promotions as a "statement of ultimate fact" (Pet. App. 15a) and its review under the "clearly erroneous" standard of the factual findings on which that conclusion is based do not appear to be inconsistent with the rationale of *Pullman-Standard*.

Should this Court grant certiorari with respect to Questions 2 and 3 presented in the petition, we would urge that the court of appeals should have either upheld the district court's finding, or remanded the case to that court for the entry of new findings. We take no position with respect to Question 1.

Respectfully submitted.

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